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March 12, 2001

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**MAR 12 2001**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

WRITER'S CONTACT INFORMATION  
202-828-5510

By Messenger

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: In the Matter of Federal-State Joint Board on Universal Service, CC Docket  
No. 96-45 / Western Wireless Corporation Petition for Designation as an Eligible  
Telecommunications Carrier for the Pine Ridge Reservation in South Dakota.

Dear Ms. Salas:

Enclosed for filing please find an original and four (4) copies of the Comments filed on behalf of Golden West Telecommunications Cooperative Inc. ("Golden West") in the above-captioned proceeding. Please note that the affidavit attached to these Comments is a facsimile; Golden West will file the original, signed copy of this affidavit with the Commission in a supplement.

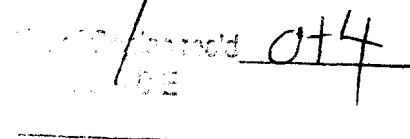
As required by the Commission's Public Notice DA 01-278, appropriate filings are being delivered on this date to the Accounting Policy Division and to the International Transcription Service, Inc., the Commission's copy contractor.

Please acknowledge receipt of this transmittal by affixing a date-stamped copy of the enclosed duplicate of the Comments marked "RECEIPT".

Respectfully submitted,

  
Benjamin H. Dickens, Jr.

Attachments



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MAR 12 2001

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

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Federal-State Joint Board on  
Universal Service

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Western Wireless Corporation Petition for  
Designation as an Eligible Telecommunications  
Carrier for the Pine Ridge Reservation  
in South Dakota

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CC Docket No. 96-45

TO: The Commission

**COMMENTS OF GOLDEN WEST TELECOMMUNICATIONS COOPERATIVE INC.**

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## SUMMARY

Golden West Telecommunications Cooperative (“Golden West”), the incumbent local exchange carrier serving the Pine Ridge Reservation, has a vital stake in the outcome of this proceeding. In its comments, Golden West demonstrates why the Western Wireless Petition should be dismissed or denied by the Commission.

First, the Commission should dismiss the Petition for lack of jurisdiction and improper forum shopping. The Petition is not properly before the Commission pursuant to the Act or the Commission’s *Twelfth Report and Order*. In establishing its framework for the resolution of ETC designation requests under Section 214(e)(6) of the Act, the Commission made crystal clear that it would not entertain an ETC designation request where a request had also been made to a state commission, and the state commission had initiated a proceeding in response to that request. As acknowledged by Western Wireless, it has initiated an ETC designation proceeding before the South Dakota PUC, seeking statewide ETC status, which is now on appeal at the South Dakota Supreme Court. Western Wireless has not met its burden of proof of demonstrating that it is not subject to the South Dakota PUC’s jurisdiction.

Second, assuming that the Commission did find the proposed offering to be unique, it must nevertheless reject the Petition because carriers would in effect no longer have the mandated burden of demonstrating that they are not subject to the jurisdiction of a state commission for purposes of an ETC designation, and the important state role of determining whether the public interest permits designation of an additional ETC for an area served by a rural telephone becomes moot.

Third, the Commission does not have sole jurisdiction to designate an ETC for a portion of a rural telephone company study area. Pursuant to Section 214(e)(5) of the Act and Section

24.507(b) of the Commission's Rules, Western Wireless cannot be designated as an ETC only on the Pine Ridge Reservation or any other portion of Golden West's South Dakota study area by the Commission alone. Rather, the Commission and the South Dakota PUC, after giving full consideration to a Joint Board recommendation, must agree to redefine Golden West's existing service area/study area to include a service area comprising the Reservation alone. Section 214(e)(5) plainly precludes the redefinition of the service area of any particular rural telephone company unless and until an appropriate Joint Board has considered the matter and has issued a recommendation proposing the division of the carrier's original study area into specific service areas for universal service purposes.

Fourth, the Petition does not serve the public interest. The public interest question that the Commission must ask is what will be the impact on Golden West's remaining subscribers if Western Wireless is granted ETC status. At a minimum, grant of ETC status to Western Wireless would raise significant questions concerning the financial burden of stranded investment for Golden West's remaining subscribers and the possible reduction in future investment by Golden West because of a reduction in revenues, neither of which are addressed by Western Wireless in its Petition. Thus, Western Wireless' arguments that its Petition is in the public interest fail. In addition, the Western Wireless' allegation concerning penetration rates is inaccurate. Contrary to Western Wireless's claim that subscribership is less than 50%, Golden West facilities pass nearly 95 percent of the Reservation households and approximately 73 percent of households are active Golden West telephone subscribers. Western Wireless' allegations concerning Golden West's rates and service are misleading and wrong. Golden West currently charges \$10.95 per month for local telephone service and Golden West's local calling area extends well outside the boundaries of the reservation and provides Reservation residents

with access to 65 communities in 27 telephone exchanges over a 23,275 square mile area. Golden West subscribers are able to access local county, Tribal and BIA government offices, Indian Health Service and other health care providers, schools and businesses without incurring toll charges.

Fifth, Western Wireless has compromised the integrity of the Commission's processes. Western Wireless has attached to its Petition, as Appendix C, a "Commemorative Proclamation honoring the Tate Woglaka Service Agreement "duly witnessed by" then Chairman William E. Kennard and by a second person who appears to be current Chairman Michael Powell. It is a well-established principle of administrative law that agency adjudications must be attended, not only with every element of fairness but with the very appearance of complete fairness. Western Wireless knew, or should have known, that it would be filing the present Petition within the next month, and that it would be employing the Agreement as the primary basis for the ETC designation requested in the Petition. Because it knew that the Agreement would soon be coming before the Commission for adjudication and decision, Western Wireless should not have invited or encouraged the participation of any Commissioner at a ceremony to celebrate the signing of the Agreement.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	
Western Wireless Corporation Petition for	)	
Designation as an Eligible Telecommunications	)	
Carrier for the Pine Ridge Reservation	)	
in South Dakota	)	

TO: The Commission

**COMMENTS OF GOLDEN WEST TELECOMMUNICATIONS COOPERATIVE**

Golden West Telecommunications Cooperative ("Golden West"), by its attorneys, submits these Comments opposing the "Petition for Designation As an Eligible Telecommunications Carrier" ("Petition") filed by Western Wireless Corporation ("Western Wireless") on January 19, 2001 with respect to the Pine Ridge Reservation in South Dakota. These Comments are filed in accordance with the Common Carrier Bureau's *Public Notice* issued in CC Docket No. 96-45, DA 01-384, released February 13, 2001.

**I. INTRODUCTION**

The Western Wireless Petition should be dismissed or denied by the Commission for any of several independent reasons. First, the South Dakota Public Utilities Commission ("South Dakota PUC"), and not the Commission, has sole jurisdiction under Section 214(e) of the Communications Act to designate one or more Eligible Telecommunications Carriers ("ETCs") in Golden West's South Dakota study area, which includes the Pine Ridge Reservation. Second,

Western Wireless has already submitted itself to the jurisdiction of the South Dakota PUC by filing a petition with it for designation as an ETC for the entire state (including the Pine Ridge Reservation), and is now improperly forum shopping in violation of the Commission's procedures for seeking ETC status for tribal lands. Third, Western Wireless is requesting that the Commission grant it ETC status for a service area smaller than Golden West's South Dakota study area, in direct violation of the express statutory requirement that modifications of a rural telephone company "service area" be made only by the Commission and the States after taking into account the recommendation of a duly instituted Federal-State Joint Board. Fourth, the designation of Western Wireless as an ETC serving the Pine Ridge Reservation will reduce the quality of service available on the Reservation, and will therefore **not** serve the public interest. Fifth, Western Wireless has gratuitously and irresponsibly compromised the integrity of the Commission's processes by involving the former and present Chairmen of the Commission in the formal "witnessing" of the Tate Woglaka Service Agreement that it knew, or should have known, would constitute the critical core subject matter underlying its Petition. Finally, if the Commission determines not to dismiss or deny the Western Wireless Petition outright, Golden West requests a full evidentiary hearing before a Commission administrative law judge to address and resolve the many and material differences between the factual allegations in the Western Wireless Petition and these Comments, including those regarding the nature, quality and cost of the existing and proposed telecommunications services on the Reservation.

## **II. BACKGROUND OF GOLDEN WEST**

Golden West is a telephone cooperative that has been incorporated in South Dakota since November 14, 1952. It presently has approximately 11,555 members, and serves a single South



Dakota study area encompassing 27 local exchanges and approximately 16, 207 access lines. Golden West was designated an Eligible Telecommunications Carrier (ETC) for this study area by the South Dakota PUC on December 11, 1997.

Golden West's relationship with the Oglala Sioux Tribe began nearly 40 years ago when Golden West first sought to bring telephone service to the then largely unserved Pine Ridge Reservation communities of Long Valley and Kyle. Golden West furthered that relationship in late 1981 with the purchase of the Pine Ridge exchange from Bison State Telephone Company, a division of Contel. Telephone customers in the Pine Ridge exchange (like their counterparts in Long Valley and Kyle) were immediately brought in as voting members of the Golden West cooperative, and have benefited over the years from one of the most advanced broadband telecommunications infrastructures in the upper Midwest.

As the incumbent local exchange carrier serving the Pine Ridge Reservation, Golden West has a vital stake in the outcome of this proceeding. Approximately 25 percent of Golden West's cooperative members are members of the Oglala Sioux Tribe on the Pine Ridge Reservation. Golden West has worked hard to bring advanced telecommunications facilities and services (including digital broadband service) to its entire service area including the Reservation, and has developed programs that take into consideration the needs of **all** of its cooperative members, both on and off the Reservation. These programs include: (a) a Local Only Telephone Service ("LOTS") program developed in the early 1990's to assist disconnected accounts and those subject to a pending disconnect order; and (b) a Line Extension policy which is designed to reduce construction charges for new subscribers. Based upon 1998 and 1999 work orders, Golden West believes that the latter policy will virtually eliminate the need for any line

extension payments (or advance payments, which are used to secure the line extension and to return the money to the subscriber) for line extensions.

Golden West has accomplished these milestones in cooperation with the Oglala Sioux Tribe. Members of the Tribe participate in the management of Golden West at the Board of Directors level. Golden West employs tribal members in its operations both on and off of the Reservation; and has engaged in training and educational initiatives in cooperation with the Oglala Sioux Tribe.

The federal universal support mechanism is an important tool supporting the deployment of telecommunications infrastructure and services in the high cost areas served by Golden West, including the Pine Ridge Reservation. Golden West's investment on the Reservation has been extensive. Since 1995, Golden West has invested approximately \$6,179,067 in advanced, digital facilities on the Reservation, and \$2.86 million is scheduled for this year. Continued universal service support is critical to these efforts.

An examination of Western Wireless' offering discloses that it is a very poor substitute for Golden West's state-of-the-art digital service. Western Wireless' service is analog, limited in capacity and its ability to maintain privacy. It is subject to weak signal coverage, if not outright dead spots. And since Western Wireless' local loop needs commercial electric power to operate, it fails to take into consideration the needs of tribal members who do not have commercial electric power.

### III. JURISDICTION

#### **A. The Commission Should Dismiss the Petition for Lack of Jurisdiction and Improper Forum Shopping**

Contrary to the assertions of Western Wireless, its Petition is not properly before the Commission because the Commission does not have jurisdiction to designate Western Wireless as an ETC under Section 214(e) of the Communications Act or under the procedures adopted in the Commission's *Twelfth Report and Order*.<sup>1</sup>

Section 214(e) of the Act confers on state commissions the primary jurisdiction to designate ETCs. Section 214(e)(6) is a limited exception to this general rule, and permits the Commission to designate a carrier as an ETC only when the state commission does not have jurisdiction to do so.

In the *Twelfth Report and Order*, the Commission established procedures to determine if and when a carrier may seek designation as an ETC directly and initially from the Commission. The Commission determined that a carrier serving "tribal lands" may request ETC designation directly from the Commission (without first seeking designation from the appropriate state commission) **only** if it has not initiated a designation proceeding before the affected state commission and **only** if it demonstrates that it is not subject to the affected state commission's jurisdiction. The Western Wireless Petition fails on both points and, therefore, it should be dismissed.

Western Wireless has not met its burden of proof of demonstrating that it is not subject to the South Dakota PUC's jurisdiction. As discussed below, Western Wireless in effect conceded

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<sup>1</sup> *In the Matter of Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order*, 15 FCC Rcd 12208 (2000) (*Twelfth Report and Order*).

that it is subject to the South Dakota PUC's jurisdiction when it filed a previous petition requesting ETC status for the state of South Dakota with that commission.

Moreover, the South Dakota PUC previously has assumed jurisdiction to designate as ETC on tribal lands, and has been supported in this determination by the Commission. Specifically, the SDPUC designated the Cheyenne River Sioux Tribal Telephone Authority ("CRST") as the ETC for a study areas located on the Cheyenne River Sioux Reservation. This Commission recognized the South Dakota PUC's authority to make this designation in the *Twelfth Report and Order*, when it dismissed the petition for ETC designation filed by the CRST because the SDPUC had already designated CRST as an ETC.<sup>2</sup>

Thus, Western Wireless clearly is subject to the South Dakota PUC's jurisdiction in this matter and, therefore, its Petition should be dismissed. Golden West defers to the comments of the South Dakota PUC for further evidence of its jurisdiction over this matter.

In addition, in establishing its framework for the resolution of ETC designation requests under Section 214(e)(6) of the Act, the Commission made crystal clear that it would not entertain an ETC designation request where a request had also been made to a state commission, and the state commission had initiated a proceeding in response to that request.<sup>3</sup> Applying that framework to several requests for ETC designation on tribal lands that were pending before the Commission, it dismissed two petitions. One such dismissal concerned a petition where ETC designation had already been granted by a state commission (the Cheyenne River Sioux Tribe); the other dismissal occurred where ETC designation requests were still pending before state regulators (Smith Bagley, Inc.)<sup>4</sup> The Commission did allow Western Wireless to continue the

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<sup>2</sup> *Twelfth Report and Order* para. 149.

<sup>3</sup> *Id.* at para. 126.

<sup>4</sup> *Id.* at paras. 141-150.

prosecution of a ETC claim before it, where a similar statewide ETC designation request had been filed with the Montana Public Service Commission. This decision appears to have been influenced, however, by Western Wireless' withdrawal of the original ETC designation request with the Montana Commission.<sup>5</sup>

As acknowledged by Western Wireless, it has initiated an ETC designation proceeding before the South Dakota PUC, seeking statewide ETC status. Although the South Dakota PUC denied ETC designation to Western Wireless, its decision was overturned by a State Circuit Court. The State Circuit Court's decision is now on appeal at the South Dakota Supreme Court. Accordingly, final determination of the status of Western Wireless' ETC petition in the state of South Dakota is still pending and, therefore, Western Wireless' Petition before the Commission must be dismissed.

Notwithstanding the Commission's clear and simple requirement that an ETC designation request may not be maintained simultaneously before the FCC and the states, Western Wireless contends that it is not forum shopping. Western Wireless' Petition claims that two reasons support its claim that coming to this Commission, while its earlier-filed ETC claim is still being adjudicated in the South Dakota courts, is not forum shopping.<sup>6</sup> Read closely, Western Wireless' "two reasons" really boil down to a claim that the service offered on the reservation is somehow "different" than the service covered by its ETC designation request filed with the South Dakota PUC.<sup>7</sup>

This argument is without merit for at least two reasons. First, the maintenance of simultaneous ETC requests, based on alleged distinctions in the service provided, is not excused

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<sup>5</sup> *Id.* at paras. 138-140.

<sup>6</sup> Petition at 17-18.

in the *Twelfth Report and Order*. Western Wireless has articulated no rationale to justify gerrymandering the Commission's own orders based on technological distinctions. Quite simply, it should not matter if Western Wireless' statewide ETC request depended on one set of frequencies, or another, if the universal service offering is the same; indeed, that is the essence of competitive neutrality.

Second, the alleged "uniqueness" of the Western Wireless service on the Pine Ridge Reservation depends chiefly, if not entirely, on financial arrangements between Western Wireless and the Tribe. If there is a difference in the service provided to the end-user, Western Wireless has not identified it. Western Wireless summarizes the "uniqueness" of its offerings as follows: "Western Wireless' Tate Woglaka Offering has been designed at the Tribe's behest and with its input, and is targeted to the needs of the Reservation. Unlike Western Wireless' other offerings in South Dakota and elsewhere, the Tate Woglaka offering is marked by substantial involvement, oversight and participation by the Tribe... Under the service agreement, the Tribe is receiving substantial benefits by participating in the deployment of the Tate Woglaka offering on the Reservation. These benefits include direct financial proceeds as well as training and employment preference benefits for the Tribe."<sup>8</sup>

It thus appears that "uniqueness" of the proposed Western Wireless service on the Reservation is based solely upon various political and financial arrangements between Western Wireless and the Tribe. The Commission has always measured the likeness of services based on customer perception.<sup>9</sup> It looks "to the nature of the services offered" and determines if

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<sup>7</sup> *Id.*, pp. 18-19.

<sup>8</sup> Western Wireless Petition, pp. 13-14.

<sup>9</sup> *American Broadcasting Companies, Inc. v. FCC*, 663 F.2d 133, 138-9 (D.C. Cir. 1980); *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 796 (D.C. Cir. 1980); *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990).

customers perceive them as performing the same functions.<sup>10</sup> If customers regard the service as the same, the services are like.<sup>11</sup> While Western Wireless defines uniqueness as differences between the Tate Woglaka proposed Offering and its ETC designation request currently before South Dakota Supreme Court, the proper “like service” analysis inquiry looks instead to customer perception. Customers utilizing the Western Wireless service on the Pine Ridge Reservation would almost certainly perceive that service like the Western Wireless service offerings elsewhere. The nature and function of the service is the same--wireless telecommunications service. The differing management styles, hiring practices, workforce training and activities, and choice of law provisions in the Tate Woglaka Service Agreement that Western Wireless evidences as unique are all background elements that would not be perceived by a customer. Customers will likely perceive that the proposed Western Wireless service on the Pine Ridge Reservation is the same as fits proposed wireless service offerings throughout South Dakota.<sup>12</sup>

The Commission has created a strict burden on the carrier to demonstrate that the state does not have jurisdiction before the Commission will entertain 214(e)(6) requests.<sup>13</sup> If a carrier such as Western Wireless can employ political and financial overlays to transform functionally equivalent services into allegedly “unique” services for ETC application purposes, it would in

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<sup>10</sup> *American Broadcasting Co. v. FCC*, 213 U.S. App. D.C. 369, 663 F.2d 133, 139 (1980). The Commission must not consider cost differentials and competitive necessity until step 3.

<sup>11</sup> *Id.*

<sup>12</sup> GCC, a wholly-owned subsidiary of Western Wireless intends to offer universal service in South Dakota through a fixed wireless offering. *In re the filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, TC98-146 (South Dakota Public Utilities Commission Findings of Fact and Conclusions of Law).

<sup>13</sup> The Commission has stated that “this is a strict burden and that generalized assertions regarding the state commission’s lack of jurisdiction will not suffice to confer jurisdiction of this Commission under section 214(e). See *Twelfth Report and Order* para. 122.

effect no longer have the mandated burden of demonstrating that it is not subject to the jurisdiction of a state commission for ETC purposes. In addition, the important state role of determining whether the public interest permits designation of an additional ETC for an area served by a rural telephone would become moot. A carrier's claim that its offering was "unique" could hence be used to circumvent the state's role under 214(e)(2). This would provide incentives to forum shop, substituting the Commission's view of the public interest for that of the state.

The Commission should accordingly dismiss the Petition. It is prohibited by the *Twelfth Report and Order* and is simple forum shopping.

**B. The Commission Does Not Have Sole Jurisdiction To Designate An ETC For A Portion of A Rural Telephone Company Study Area**

In the case of an area served by a rural telephone company like Golden West, Section 214(e)(5) of the Communications Act defines the term "service area" for the purpose of determining universal service obligations and support mechanisms as "the [rural telephone] company's 'study area' unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under Section 410(c), establish a different definition of service area for such company."<sup>14</sup>

The Commission has recognized this express statutory requirement, and has adopted identical language in Section 54.207(b) of its Rules.<sup>15</sup> In so doing, the Commission stated that "the Act requires the Commission and the states to act in concert to alter the service areas for

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<sup>14</sup> 47 U.S.C. Sec. 214(e)(5).

<sup>15</sup> 47 C.F.R. Sec. 54.207(b).



areas served by rural carriers.”<sup>16</sup> It further declared that “the plain language of section 214(e)(5) dictates that neither the Commission nor the states may act alone to alter the definition of service areas served by rural carriers.”<sup>17</sup> In addition, the Commission has concluded that “the language ‘taking into account’ [in Section 214(e)(5)] indicates that the Commission and the states must each give full consideration to the Joint Board’s recommendation and must each explain why they are not adopting the recommendations included in the most recent Recommended Decision or the recommendations of any future Joint Board convened to provide recommendations with respect to federal universal service support mechanisms.”<sup>18</sup>

The Commission has adopted procedures in Sections 54.207(c) and (d) of its Rules for the joint modification of a rural telephone company’s service area for universal service purposes by the Commission and a state. It has summarized these procedures as follows:

... after a state has concluded that a service area different from a rural telephone company’s study area would better serve the universal service principles found in section 254(b) [of the Act], either the state or a carrier must seek the agreement of the Commission. Upon the receipt of the proposal, the Commission will issue a public notice on the proposal within 14 days. If the Commission does not act upon the proposal within 90 days of the release date of the public notice, the proposal will be deemed approved by the Commission and may take effect according to the state procedure [footnote omitted]. If the Commission determines further consideration is necessary, it will notify the state commission and the relevant carriers and initiate a proceeding to determine whether it can agree to the proposal. A proposal subject to further consideration by the Commission may not take effect until both the state commission and this Commission agree to establish a different definition of a rural service area, as required by section 214(e)(5). Similarly, if the Commission initiates a proceeding to consider a definition of a rural service area that is different from the ILEC’s study area, we shall seek the agreement of the relevant state commission by submitting a petition to the relevant state commission according to that state commission’s procedure. No definition of a rural service area proposed by the

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<sup>16</sup> Federal-State Joint Board on Universal Service, *Report And Order*, CC Docket No. 96-46, 12 FCC Rcd 8776, para. 186 (1997).

<sup>17</sup> *Id.* at para. 187.

<sup>18</sup> *Id.* at para. 187.

Commission will take effect until both the state commission and this Commission agree to establish a different definition.<sup>19</sup>

Here, Golden West serves a South Dakota study area comprising 23,275 square miles and serving approximately 16,207 access lines. This entire study area includes exchanges serving the Pine Ridge Reservation and exchanges serving areas outside of the Reservation. Approximately 11,579 square miles (50.52 percent) of the land area of Golden West's study area lies within the Reservation. The Reservation area includes all or part of Golden West's Pine Ridge, Kyle, Long Valley, Interior and Martin exchanges. The access lines served by Golden West on the Pine Ridge Reservation constitute 28 percent of the total access lines within its South Dakota study area.

Pursuant to Section 214(e)(5) of the Act and Section 24.507(b) of the Commission's Rules, Western Wireless cannot be designated as an ETC only on the Pine Ridge Reservation or any other portion of Golden West's South Dakota study area by the Commission alone. Rather, the Commission and the South Dakota PUC, after giving full consideration to a Joint Board recommendation, must agree to redefine Golden West's existing service area/study area to include a service area comprising the Reservation alone. Golden West believes that the language of Section 214(e)(5) plainly precludes the redefinition of the service area of any particular rural telephone company unless and until an appropriate Joint Board has considered the matter and has issued a recommendation proposing the division of the carrier's original study area into specific service areas for universal service purposes. Even under the more liberal interpretation in Section 54.207(c) and (d) of the Commission's Rules (which attempts to limit or eliminate the specific Joint Board recommendation), both the South Dakota PUC and the Commission must agree to any modification of the Golden West study area/service area into smaller service areas.

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<sup>19</sup> *Id.* at para. 188

#### **IV. THE PETITION DOES NOT SERVE THE PUBLIC INTEREST**

The Petition should be denied because it does not meet the public interest requirement in Section 214(e)(6). Pursuant to Section 214(e)(6) of the Act, before the Commission may designate an additional ETC for an area served by a rural telephone company, it must find that such designation is in the public interest. In its Petition, Western Wireless offers a number of reasons to support its public interest showing. This showing, however, as demonstrated below, fails. Accordingly, the Commission cannot grant Western Wireless ETC status because such designation is not in the public interest.

In its Petition, Western Wireless asserts that its designation as an ETC is in the public interest for the following reasons. Western Wireless asserts that when the Tribe approved the Service Agreement, it indicated the interests of residents would be served. Western Wireless also asserts that its designation as an ETC would improve tribal telephone penetration, which, allegedly, currently is less than 50%. In addition, it would expand local calling areas, lower rates and improve customer service. Western Wireless also asserts that its designation would facilitate competition and promote the rapid development of new technologies by Western Wireless and the incumbent. Finally, Western Wireless asserts that its designation would provide the benefits of mobility to consumers.

##### **A. Western Wireless Does Not Address the Key Public Interest Question**

As an initial matter, even assuming that the Tribe's approval of the Service Agreement indicates that the interests of residents will be served, this is not the controlling question concerning the public interest. Rather, the public interest question that the Commission must ask

is what will be the impact on Golden West's remaining subscribers if Western Wireless is granted ETC status. Golden West's telephone service subscribers support the entire Golden West telephone network investment cost including the network serving the residents of the Pine Ridge Reservation. Therefore, the remaining Golden West local telephone service customers would have to support the stranded investment costs that could result if Western Wireless is designated as an ETC. Erosion of the Golden West customer base could eventually impact the availability of capital improvement funds. Thus, at a minimum, grant of ETC status to Western Wireless would raise significant questions concerning the financial burden of stranded investment for Golden West's remaining subscribers and the possible reduction in future investment by Golden West because of a reduction in revenues, neither of which are addressed by Western Wireless in its Petition.

As recognized by the Common Carrier Bureau when it granted Western Wireless' ETC Petition for Wyoming, the public interest requirement was added because Congress intended to preserve and advance universal service in rural areas as competition emerges. The Bureau states its belief that Congress was concerned "that consumers in areas served by rural telephone companies continue to be adequately served should the incumbent telephone company exercise its option to relinquish its ETC designation under section 214(e)(4)."<sup>20</sup> As an initial matter, Western Wireless' Petition does not propose service to the entire Golden West service area. Therefore, even under the Bureau's finding Western Wireless has not demonstrated that consumers would be adequately served if Golden West relinquishes its ETC designation.

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<sup>20</sup> *In the Matter of Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier In the State of Wyoming*, CC Docket No. 96-45, DA 00-2896, para. 18 (rel. December 26, 2000).

In addition, the Bureau's finding is too narrow. Section 254 of the Act indicates that one of the goals of universal service is to ensure that comparable services at comparable rates are available to consumers in rural areas. Thus, the public interest analysis cannot be limited to an examination of whether consumers will be able to continue to obtain any service, no matter how inferior, if Golden West should withdraw from the Pine Ridge Reservation. Rather, to meet the public interest requirement, the Commission must find that consumers will be able to obtain comparable services at comparable rates to those in urban areas, if Western Wireless is granted ETC status. Finally, in the event that the Commission does not dismiss the Petition on jurisdictional or other grounds, Golden West requests an evidentiary hearing to address the public interest determination regarding designation of a second ETC in the service area of Golden West.

**B. Western Wireless' Allegation Concerning Penetration Rates is Inaccurate**

Western Wireless also argues that grant of its Petition is in the public interest because it would lead to improved telephone penetration levels which allegedly are currently less than fifty percent. As demonstrated herein, this allegation is simply false.

The Pine Ridge Indian Reservation consists of approximately 2,000,000 acres in Southwestern South Dakota near the Nebraska border. Golden West currently provides universal telephone services throughout the Pine Ridge Indian Reservation. Golden West serves approximately 4538 access lines on the Reservation located in numerous small communities primarily in its Pine Ridge, Kyle and Long Valley exchanges. Since 1995, Golden West has invested \$6,179,067 in digital switching, fiber optic cable and other facilities to improve and enhance the Golden West exchange services on the Reservation. The Company has well over

900 miles of cable on the Reservation with fiber optic cable making up more than one-third of that total. These facility upgrades have allowed Golden West to improve its quality and level of service and provide new services to its Cooperative members on the Reservation, including equal access, custom calling and advanced intelligent network (AIN) options and high-speed access to the Internet. Golden West's broadband network has also made it possible to meet the growing demand for bandwidth on the Reservation. Records show seventy-seven (77) T-1s, fifteen (15) 56K and five (5) voice grade circuits currently in service on the Pine Ridge Indian Reservation.

Golden West's commitment to upgrading its services to the Pine Ridge Indian Reservation is continuing through a projected \$2,862,413 investment in year 2001 in facility upgrades and another \$550,000 in 2002. These additional investments in facility upgrades will allow Golden West to further improve its telephone service to the Reservation and expand the availability of high speed internet access and other broadband based services.

As a result of Golden West's aggressive investment, Golden West facilities pass nearly 95 percent of the Reservation households and approximately 73 percent of households are active Golden West telephone subscribers. These figures were established by an audit of Golden West's facilities, which began in April of 2000, utilizing global positioning satellite (GPS) technology to identify the location of Golden West's residential telephone facilities on the Pine Ridge Indian Reservation. The audit was undertaken in response to assertions that less than 50 percent of the Reservation's residents had telephone service, which assertion is repeated here by Western Wireless.<sup>21</sup>

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<sup>21</sup> Golden West undertook the audit of its facilities as a result of a meeting with the FCC's Wireless Bureau in April, 2000.

The audit followed methodology designed by Randall M. Stuefen, director of research and Dr. Gene B. Iverson, professor of statistics, for the Business Research Bureau of the University of South Dakota in Vermillion, SD.<sup>22</sup> A random sample of 175 addresses was selected from the list of 4,164 global positioning addresses that had been electronically mapped and supplied to the Business Research Bureau by the Golden West's Engineering Department. Two teams in separate vehicles collected the data over a two and one-half day period. There were not fewer than three people in each of the two teams as the data was collected. Two people on each team were in the employment of Golden West. There was an engineering representative and a local employee familiar with the area of interest. The Golden West engineering representative on each team had participated in the initial mapping of the housing structures. The local Golden West employees, with the exception of the foreman from the Long Valley exchange, are enrolled members of the Oglala Sioux Tribe. Representatives of the Rural Utility Service also participated in the survey.<sup>23</sup> There also was Native American representation, individuals not in the direct employment of Golden West, in the vehicles throughout most of the data collection period.

The findings from this audit confirmed that Golden West had buried cable in place capable of providing telephone service to 94.7% of the inhabitable homes on the Reservation. Inhabitable homes, for the purposes of the audit, were defined as structures with intact doors and windows capable of housing a family.

After the audit, Golden West endeavored to determine active penetration rates in addition to plant penetration. A thorough study of Golden West's billing system during the July 2000

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<sup>22</sup> Golden West tried without success on a number of occasions to involve representatives of the Oglala Sioux Tribe (OST) in the GPS survey and in the subsequent audit of its results.

<sup>23</sup> See Letter attached at Appendix A.

billing period demonstrated that the percentage of homes with active telephone service was approximately 73 percent. This percentage was determined after subtracting additional lines at the same residential address that may have been a teen line or a second line for Internet service.

Thus, Golden West's actual penetration rate on the Reservation greatly exceeds the rate alleged by Western Wireless. In addition, Golden West has undertaken numerous efforts to improve this rate. The GPS survey and audit make it clear that subscribership levels on the Reservation are impacted primarily by economic factors, and not the availability of Golden West facilities.<sup>24</sup> For example, unemployment estimates on the Reservation are as high as 42.9 percent and Shannon County, the location of much of the Pine Ridge Indian Reservation, has the third highest poverty level in the Nation, thus contributing to a higher than normal service disconnect and bad debt rate.

Among its efforts to address these issues and increase subscribership, Golden West has been very active in promoting the FCC's Enhanced Lifeline Program. The Company has undertaken an extensive education effort to make more people aware of the program, including providing information via direct mail, general media and company sources.<sup>25</sup>

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<sup>24</sup> Almost all of the Reservation households have had telephone service at some time in the past. Many of those that do not, may not want service or may have been disconnected for non-payment.

<sup>25</sup> Golden West's efforts include a direct mail solicitation to existing Lifeline customers to make them aware of the Enhanced Lifeline Program; public service announcements on the Enhanced Lifeline Program for the radio stations that serve the Rosebud and Pine Ridge Reservations and South Dakota Public Radio; letters to the Social Services Program managers on the Lower Brule, Rosebud and Pine Ridge Indian Reservations outlining the Enhanced Lifeline/Link-Up programs; placement of a scrolling message on the Prevue Channel (schedule information) and the Weather Channel on the Golden West cable television systems in the reservation communities of Kyle, Wanblee, Manderson and Evergreen; an article in the company newsletter that went to all existing customers on the Enhanced Lifeline/Link-Up Programs, which included an application form for the program; a billing message on the Enhanced Lifeline/Link-Up Programs on customer bills; news releases in the area newspapers and Pow Wow magazine outlining the Enhanced Lifeline Program; and meetings with residents



These efforts have resulted in increased Lifeline enrollment on the Rosebud, Lower Brule and Pine Ridge Reservations. Estimated Lifeline penetration levels from September 1, 2000 to February 13, 2001, increased on the Pine Ridge Reservation from five percent to twenty-two percent; on the Rosebud Reservation from six percent to forty-four percent, and on the Lower Brule Reservation from thirteen percent to fifty-five percent.

Golden West also has encouraged the Reservation schools to take full advantage of available e-rate discounts. The Cooperative is currently working with the Oglala Nation Educational Consortium (ONEC) on a project that, if funded by the e-rate program, would use Golden West's fiber optic facilities to connect all of the schools on the reservation for interactive educational and other purposes. Golden West also has donated \$15,000 to the Oglala Lakota College (OLC) for the creation of a Lakota Language and a Lakota Studies position, and it has worked cooperatively with OLC's Model Institution for Excellence program to provide distance learning between the College and its 10 district college centers.

Golden West implemented the LOTS Program (Local Only Telephone Service Program) in the early 1990's to assist consumers who had been disconnected and to prevent consumers from being disconnected, for non-payment of service. The LOTS Program allows consumers to establish telephone service on a local service only basis. Golden West estimates that approximately 795 customers on the Reservation have benefited from this program in recent

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on the Pine Ridge Reservation. In addition, all new customers receive a packet of information from Golden West that includes a copy of the Enhanced Lifeline application form; Golden West's Website includes information on the Enhanced Lifeline Program and a copy of the Lifeline application form; and the Golden West Regional Telephone Directory that is distributed on the Pine Ridge Indian Reservation includes copies of the Regular and Enhanced Lifeline application forms.